IN THE

Supreme Court of the United States.

October Term, 1923.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
THE UNITED STATES.
No. 248.

BRIEF FOR APPELLANT.

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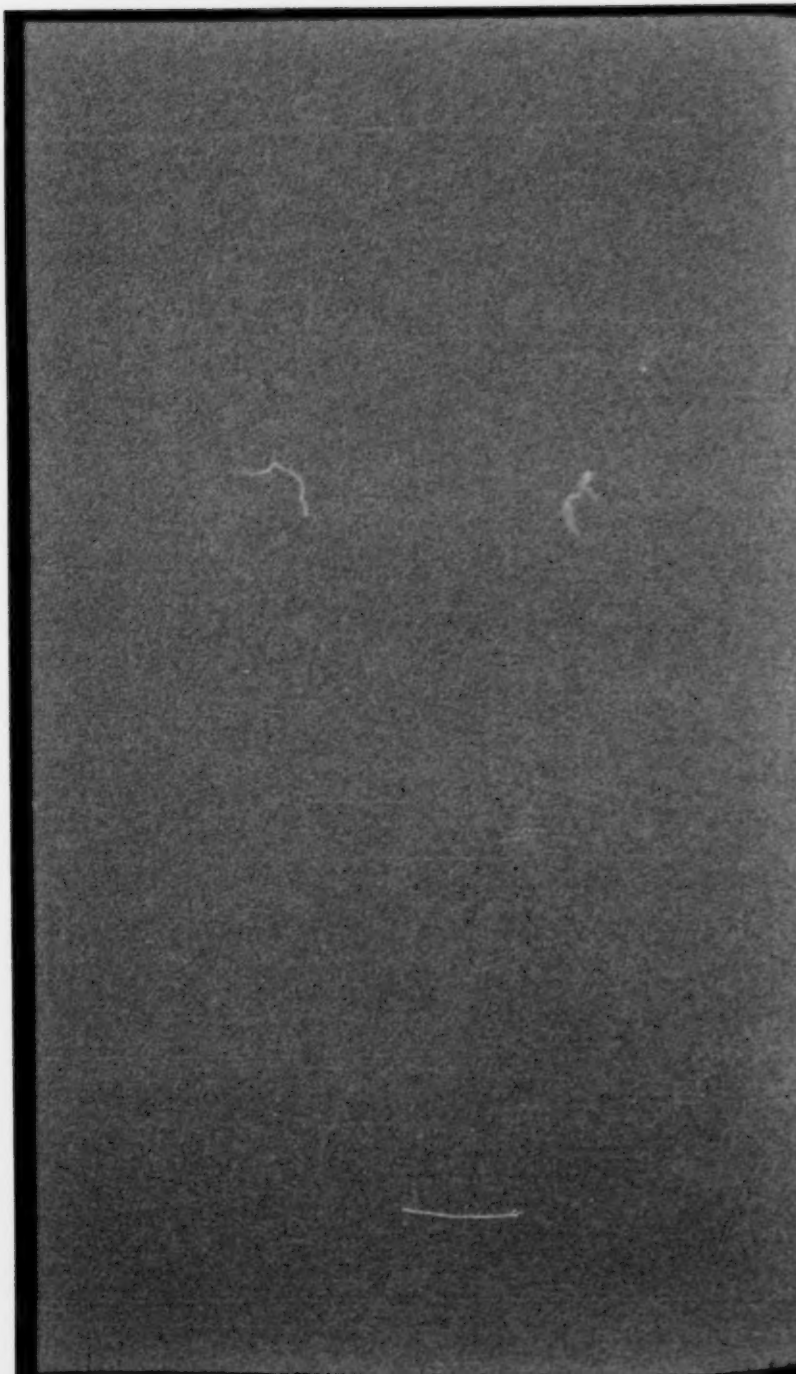

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BRIEF FOR APPELLANT.

The question which this case presents is whether freights intended for Government uses, but which the Government was under no obligation to accept until after they had reached destination, were, while in transit, "property of the United States" and lawful subjects of transportation rates at which, in virtue of land grants, "property of the United States" should be transported. This, and two other cases of other carriers which are before this court arose out of the contumacy of disbursing officers in claiming for the Government a privilege which had been denied to it by repeated decisions of the Comptroller of the Treasury. That officer had first ruled in favor of the carriers in cases where commercial bills of lading had been used. The first device, then, of officers making shipments, was to require the use of Government bills of lading; but the Comptroller held that the rights of the parties were not affected by this detail. Some over-zealous officers then had recourse to a form of purchase from producers

of the materials by which purchase prices applied at the points of shipment. The shipments were on Government bills of lading; but specific stipulations were (1) that, although the Government would pay, or advance, the freight charges, the shipper would be responsible for the shipment, including demurrage charges which might be incurred, and (2) that examination, in one form or another, would be made by the Government's officers after delivery at, or beyond, points of destination, that nothing would be accepted which did not successfully pass this test and that shippers would remove rejected materials and repay the transportation charges on those quantities.

Assuming, from the fact that Government bills of lading were used and the fact, in some instances, that the shipper, as well as the consignee, was a Government officer, appellant, upon delivering the freights, rendered and collected its bills at land-grant rates. Thereafter, it received intimations regarding the terms of the contract under which the shipments were made and, upon investigation, ascertained the facts here stated.

Assignment of Errors.

Appellant says that the Court of Claims erred:

1. In holding that materials which the Government had the option to accept or reject at points of delivery were the property of the Government while in transit.

2. In holding that land-grant rates were applicable to the transportation of materials which the Government did not accept until after delivery at destination.

3. In dismissing the petition.

Propositions.

1. Land-grant rates are not lawfully applicable to any transportation, even though procured by Govern-

ment officers of the United States, except of property of the United States.

2. That supplies ordered by and shipped to authorized officers of the United States, who were to test or inspect them, at or beyond destinations, and thus determine whether to reject or accept them, did not, while in course of transportation, belong to the United States.

3. That the fixing of purchase prices to apply at points of shipment does not effect a transmission of title to commodities from the producers to the United States if the acceptance of the supplies by the United States depended, by contract, upon questions to be determined by its officers at or beyond destinations of the shipments.

4. That the mere payment of freight charges by a consignee does not divest title to the freights out of the shipper and vest it in the consignee.

Argument.

While the subject matter of this suit is correctly presented in the foregoing statement of facts, the controversy really concerns only a part of the shipments narrated in the findings of the Court of Claims. In most of these transactions nothing occurred to vest title to the freights in the United States until after delivery at or beyond destinations, but in others, viz., those to which finding VII relate, (lumber from mills in the state of Washington shipped to Chicago) there was to be, and was, a definitive examination of the material at the mills from which it came, and acceptance or rejection occurred at those points; the United States engineer for that district, at the request of the engineer for the Chicago district, having assumed that function and stationed his inspectors at the mills. Appellant con-

cedes that it has no right of action on these exceptional transactions; but it asserts its right, regarding the others, to be paid the difference between land-grant rates, which were paid, and the full tariff rates.

With respect to numerous shipments of coal, terminating at Missouri River points, appellant will ask this court to assert its power in order to establish the fact that, under the provisions of the contract, appellant delivered coal into its own barges and it was kept there until, in the progress of the work, it was needed, the Government paying no demurrage, rental or other like charge. A motion will be made for this emendation of the findings, if this court should deem it necessary.

It is elementary that, in executory contracts of sale between private parties, stipulated preliminaries, e. g., acceptance or examination, or selection of some part out of a mass, must be performed before title passes out of the seller; and nothing is clearer in the adjudications of this and other courts than that, in matters of contract, the Government's rights and obligations are precisely those of private sellers and buyers. This canon of the transmission of title, the layman might say, has been carried to a great length by the courts. A familiar illustration since 1882 has been *Clarkson* v *Stephens*, 106 U. S. 505, where, as it happened, the Government was a party. The appellant in that case undertook to build, and in large part did build, a war steamer for the United States. The Secretary of the Navy, under express provisions of the contract, appointed agents who received materials in the shipyard, gave receipts for them as property of the United States and marked them "U. S." Payment was to be in installments, on approval by inspectors as to qualities but not values, for materials purchased and used; but before final payment the completed vessel was to be surveyed

by a board provided for in the agreement and a certificate given that the contract was fully performed. Stephens died without completing the ship and his estate was declared bankrupt. By his will he directed his executors to complete it at cost of a million dollars and then give it as a present to the State of New Jersey. This direction substantially was carried out. Suit was brought by the executors against the Attorney General of the State for construction of the will. This court held that title actually did not pass from Stephens to the United States, and could not have passed, if the vessel had been completed, because the stipulated survey and certification had not been made.

Following are typical cases of State courts:

Gorman v. *Kennedy*, 126 Mich., 182, like the present case, arose out of a public improvement, and the decision was that the material in question did not become public property until, at the place of use, tested by specifications of the public authorities. The plaintiff, a quarryman, had quarried curb-stones for use on streets of the city of Detroit and had given what was held to be a guaranty that the quality should be up to specifications of the city Board of Public Works. Delivery was to be made by the quarryman at Detroit. The court said: "'On cars at Detroit,' or 'f. o. b. cars at Detroit' did not mean the place agreed upon for inspection and acceptance, but only defined the place where the expense of transportation of plaintiff ceased and that of defendants began."

Even in the detail of payment of transportation charges to points of destination that case and the case here presented are identical.

Smart v. *Batchelder*, 57 N. H., 140, dealt with a contract for the sale, out of a stock of boards at a saw mill, of so much as should prove to be merchantable; delivery of the whole stock to be made by the miller at a place named, where there was to be a survey as to quality. Failing such a survey, it was held, there was no sale.

In *Cornell* v. *Clark*, 104 N. Y., 451, ties delivered to a railroad company under contract were to be inspected and classed. No inspection having been made, the company had avanced moneys to the contractor. Upon the insolvency of the latter it was held that the title was still in him—there had been no sale of any tie.

To the same effect—treating advances as having no effect on the title when inspection and acceptance were omitted—are

Smith v. *Wisconsin Investment Co.*, 144 Wis., 151.

Wagar v. *Farren*, 71 Mich., 370.

So it is immaterial in the present case that the Government's officer, upon visual inspection and acceptance of coals at destination, was authorized to pay a percentage of the base price named in the contract.

In a like case (of advances without inspection) logs had been delivered, by the contractor at a place stipulated and thereafter he had sold and delivered them to a third party. On proceedings against him for a conversion the court *assumed* that examination and acceptance were intended in the first transaction and so decided that the title to the logs, unexamined, remained in him and the second transaction was lawful.

Pike v. *Baughn* et al., 39 Wis., 499.

In *Blodgett* v. *Hovey*, 90 Mich., 571, and in *Wagar* v. *Farren*, *sup.*, inspection was prevented by accidental destruction of the property, and it was held that the

loss was the sellers'—that the title had not passed. If in such a case as is here presented any consignment of materials were destroyed while in transit, and the Government was to stand the loss, what would the loss have been: what kind of bill could the skipper have rendered when no selection had been made, by inspection, of materials which the Government would take and use? In fact the bills were made in this case for those quantities which the Government agents, at the places of use, had approved as of the contract quality.

Not infrequently when nothing remained to be done but to determine the prices, title has been held to have passed by delivery of the goods; but in those cases the goods themselves, the subject of the valuations, were absolutely identified. Here the quantity passing by the sale was to be determined by the inspection, and until this was done it was impossible to fix any value (contract price) for the consignment.

In this case, as regards coal shipments delivery was made by the sellers to themselves, on their own barges, at points of destination, and the supplies were held there, at their risk, until inspected and accepted.

Policies and Forms Must Yield to Legal Rights.

In availing of land-grants the Illinois Central Railroad Company contracted to transport "property of the United States," and no property of any other owner, beside organized troops of the United States, and no other passengers, at special rates. To transport at those special rates property of which the United States might thereafter be the owner, or property which, or some undefined part of which, was expected, after shipment, to be used by the United States, is another

thing. The Government, like any private operator, has its option. It may buy goods at points of production, ship them on its own account and so stand the risk of the loss before delivery at points of destinations and use, or it may leave all such risks to the dealers in such goods and make its purchases from them at the places of use. In the one case the bringing of the goods to the points of use is a Government transaction, and Government rates should apply to the transportation; in the other case it is not a Government transaction, and there is no escape from paying the commercial rates.

An ideal *policy*, from the point of view of the Government's exchequer, would be for the Government to escape all burdens of the transportation but to avail of land-grant rates. This the law does not countenance; but it is precisely what has been done in these cases.

If this practice were lawful, why should not the Government buy from large dealers in the principal markets, to which the materials had been brought by land-aided railroads, and then charge to and collect from the railroad companies the differences between land-aided rates and the rates which had actually been paid to them in this assembling of the stocks? In substance that procedure and the one here at issue are the same.

An accepted land grant is a contract for the carriage of "property of the United States" at reduced rates. It is not a contract for the carriage of something which ultimately may serve the Government's use, being *in presenti* private property. Congress might have made provision for a contract of this latter effect, but it did not see fit so to do.

That the Government, by the practice here con-

cerned, obtains the same benefit that would have followed from taking title at points of shipment on land-aided lines and paying land-grant rates, is immaterial. What this court said in *United States* v. *Union Pacific Railroad Co.*, 249 U. S. 354 (359) is equally pertinent here, viz., "the fact that the transportation is for the purposes of the Government in connection with its military establishment is immaterial." Under this observation the court made reference to the *Alabama Great Southern Railway Company's* case, 49 Ct. Cls. 522, relating to transportation of state militia, at the expense of the United States, to camps of instruction where they were to be commanded by United States officers, all under Federal law; the decision, which forbade the application of land-grant rates in such cases being rested flatly on the definition of the word troops, without regard to the interest of the United States in the passengers transported.

The Court of Claims repeatedly, commencing with two cases of the Louisville & Nashville Railroad Company, 50 Ct. Cls. 414 and 54 Ct Cls. 161, has decided that land-grant rates do not apply to personal property of army officers involved in a change of station of the command. Here, again, the question was whether the chattels were included in the phrase "property of the United States." Since they were not so included, it was immaterial that the Government's interest required their transportation; that the officer was not able to function without his clothing, accoutrements, books, desk, etc., at the new post any more than at the old.

For the transportation of private property, in short, a railroad company, although land-aided, is entitled to be paid full commercial rates, notwithstanding any collateral interest of the Government or simulation of a

transmission of title to the Government at the commencement of the shipment.

Claims not Barred while Transactions were by the Railroad Company.

The only practical effect of the use made of Government bills of lading is to give this court jurisdiction of transactions more than six years old at the time the suit was instituted. This misapplication by Government officers of a Government form was a legal fraud upon the railroad company; and, according to the adjudications in like cases, time did not begin to run against the assertion of the railroad's claim so long as its officers were in ignorance of the real facts. The company pleads that until after its bills on these shipments were paid it had no notice that the freights involved did not belong to the Government; and on the Government's part there is no proof of anything that could have carried such notice.

In *Exploration Co.* v. *United States*, 247 U. S. 435, this court construed an enactment of Congress of March 3, 1891, (26 Stats. L. 1093), authorizing suits by the United States, for vacating land patents, to be brought "within six years after the date of the issuance of such patents." The patent there concerned had been obtained by fraud, which was concealed by the patentee until after the limited six years had passed. The decision was that the time of the bar ran from the Government officers' discovery of the fraud. After reviewing adjudications of similar questions arising between individuals the court said (p. 449):

> "We are aware of no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud,

should not apply in favor of the Government as well as a private individual."

This observation seems a sufficient recognition of the rule that a statute of limitation does not operate against a private person while he has fradulently been kept in ignorance of his right. The court reviewed or cited divers suits between private parties, and there is no suggestion that the rule must be different where the suit is against the Government, whose agents had kept a citizen quiet by deceiving him.

On the face of the laws the commencement of the limitation period is more distinctly marked in the patent-cancellation statute than in the act governing the jurisdiction of the court. In the former case, it will be observed, this is a day certain, that of the issuance of the patents. Suit is to be brought in the Court of Claims within the next six years "after the claim first accrues." (Judicial Code, sec. 156.) All of the statutes reviewed in *Exploration Co.* v. *United States* were in practically the same words, and none contained any saving against hidden fraud; yet the rule was approved that the statutes "did not begin to run until the discovery of the fraud."

Shall it be said that the act relating to the Court of Claims is jurisdictional and that the patent-cancellation act (granting a remedy where none existed before) is not jurisdictional? But even so, are not the same words to bear in a jurisdictional statute the same meaning that they bear in a statute of procedure or evidence.

This question of limitation arises only on a few transactions listed in paragraph V of claimant's requests for findings.

Respectfully submitted,

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